Privy Council Appeal No. 24 of 1982

The Attorney General of Trinidad and Tobago and Another *Appellant*

v.

Errol McLeod *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH JANUARY 1984

Present at the Hearing:

LORD DIPLOCK
LORD ELWYN-JONES
LORD KEITH OF KINKEL
LORD ROSKILL
LORD TEMPLEMAN

*[Delivered by **Lord Diplock**]*

The question of substantive law in this appeal is whether Act No. 15 of 1978, of which the long title is "An Act to amend the Constitution of the Republic of Trinidad and Tobago Act, 1976", ("the Amendment Act") is void under section 2 of the Constitution because it was not supported at the final vote thereon by not less than three-quarters of all the Members of the House of Representatives ("the House").

The respondent, Errol McLeod, contended that a favourable vote of this size in the House was required, by section 54(3) of the Constitution, in order to validate the Amendment Act which purported to amend section 49(2) of the Constitution by adding to the four existing paragraphs, which set out circumstances in which a member of the House is required to vacate his seat, a fifth paragraph in the following terms:-

> "(e) having been a candidate of a party and elected to the House, he resigns from or is expelled by that party."

[2] The appeal also raises a subsidiary question of procedural law as to whether Mr. McLeod's proper

remedy was by originating motion for redress under section 14(1) of the Constitution, for which the procedure was regulated by Order 55 of the Rules of the Supreme Court, or was by the ordinary process of an originating summons for a declaration that the Amendment Act was void.

The facts which gave rise to the originating motion can be stated very shortly. Mr. McLeod stood for election to the first parliament of the Republic as a candidate of the United Labour Front. He was duly elected, but would appear to have fallen out with the party leadership by the spring of 1978. The Amendment Act received 27 favourable votes in the House. This in number fell short of three-quarters of the total membership by one vote. It was assented to by the President on 19th April 1978. On 24th April, 1978, a letter was addressed to Mr. McLeod by the General Secretary of the United Labour Front threatening him with disciplinary proceedings by the party. To this Mr. McLeod reacted promptly; on 28th April 1978, he issued in the High Court an originating motion under section 14(1) of the Constitution seeking a declaration that the Amendment Act was null and void, and an order restraining the Speaker of the House from making a declaration that Mr. McLeod had resigned from, or had been expelled by, the party as a candidate of which he had been elected. The claim to an injunction was based on section 4 of the Amendment Act. This inserted a new section in the Constitution, numbered 49A, which provided for such a declaration being made by the Speaker, upon his being informed by the Leader in the House of the party as a candidate of which the member was elected, of the resignation or expulsion from that party of a member. Upon the expiration of fourteen days from such declaration section 49A obliged the member to vacate his seat unless within that period he instituted legal proceedings to challenge the allegation that he had resigned, or his expulsion.

The proceedings which Mr. McLeod instituted by originating motion were heard by Bernard J., on 19th December 1978. He dismissed Mr. McLeod's application on the ground of substantive law that section 49(2) of the Constitution, that the Amendment Act purported to alter, was not entrenched by section 54(3) of the Constitution. It could thus, under section 59 of the Constitution, be validly passed by a majority of members present and voting in the House and the Senate respectively.

Mr. McLeod's appeal from the dismissal of his motion was allowed by the Court of Appeal on 29th July 1981. They granted the declaration that he

sought. Shortly after this, however, the Parliament of which he was a member was dissolved; and Mr. McLeod did not stand for re-election to the new Parliament. He ceased to have any further interest in the proceedings that he had started, with the result that although his name appears upon the record as respondent Mr. McLeod has taken no part in the appeal to this Board for which the appellants, the Attorney General and the Speaker, obtained final leave on 5th April 1982. Their Lordships have thus been deprived of the advantage of hearing any argument adverse to that that was presented on behalf of the appellants; though, so far as the point of substantive law is concerned, this handicap has been mitigated by the three separate closely reasoned judgments of the Court of Appeal in the respondent's favour.

Section 2 of the Constitution of Trinidad and Tobago provides:-

> "2. This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency."

Although supreme the Constitution is not immutable. As was pointed out in the majority judgment of the Judicial Committee in *Hinds and Others v. Regina* [1977] A.C. 195 at p. 214 constitutions on the Westminster model, of which the Constitution of the Republic of Trinidad and Tobago is an example, provide for their future alteration by the people acting through their representatives in the parliament of the state. In constitutions on the Westminster model, this is the institution in which the plenitude of the state's legislative power is vested.

Such is the case in Trinidad and Tobago. Section 54(1) of the Constitution provides expressly that Parliament may alter <u>any</u> of the provisions of the Constitution. Except as respects those provisions of the Constitution ("the entrenched provisions") specified in sub-sections (2) or (3) of section 54, an Act of Parliament altering a provision of the Constitution and containing, as sub-section (5) requires, an express statement that such is its purpose, is valid and effectual if passed in the House of Representatives and the Senate in accordance with sections 59 to 61: that is to say by a simple majority of the members in each House present and voting thereon, and assented to by the President.

As respects the entrenched provisions it is convenient to set out sub-sections (2), (3) and (6) of section 54 in full, (omitting only references to the Trinidad and Tobago Independence Act, 1962):-

"54(2) In so far as it alters -
(a) sections 4 to 14, 20(b), 21, 43(1), 53, 58, 67(2), 70, 83, 101 to 108, 110, 113, 116 to 125 and 133 to 137; or
(b) section 3 in its application to any of the provisions of this Constitution specified in paragraph (a),
a Bill for an Act under this section shall not be passed by Parliament unless at the final vote thereon in each House it is supported by the votes of not less than two-thirds of all the members of each House.

(3) In so far as it alters -
(a) this section;
(b) sections 22, 23, 24, 26, 28 to 34, 38 to 40, 46, 49(1), 51,55, 61, 63, 64, 68, 69, 71, 72, 87 to 91, 93, 96(4) and (5), 97, 109, 115, 138, 139 or the Second and Third Schedules;
(c) section 3 in its application to any of the provisions specified in paragraph (a) or (b); or.....

(6) In this section references to the alteration of any of the provisions of this Constitution.....include references to repealing it, with or without re-enactment thereof or the making of different provisions in place thereof or the making of provision for any particular case or class of case inconsistent therewith, to modifying it and to suspending its operation for any period."

It is to be noted that whereas section 49(1) is included in the entrenched provisions specified in sub-section (3)(b) of section 54, section 49(2) does not figure among the provisions entrenched by either sub-section (2) or (3) of section 54. Sub-section (1) of section 54 therefore authorised its alteration by an Act of Parliament passed in the same way and by the same majorities in each House as an ordinary law, provided that it stated, as the Amendment Act did in its long title, that its purpose was to alter the Constitution.

It was upon this simple ground that Bernard J. decided the point of substantive law against Mr. McLeod. Accordingly, he did not find it necessary to decide the question of procedural law.

The Court of Appeal, founding themselves upon the wide definition of "alteration" in section 54(6), held that sub-section (2) of section 49 as it stood before the passing of the Amendment Act had the effect of modifying sub-section (1) of that section which <u>is</u> entrenched by section 54(3). Their

reasoning was that the Amendment Act makes an additional modification to the entrenched sub-section (1) and accordingly, in order to be valid, the Bill for the Act must at the final vote thereon have been supported in the House of Representatives by the votes of not less than three-quarters of the members of the House, and this requirement had not been satisfied.

This makes it necessary for their Lordships to set out the full text of section 49(1) and (2) of the Constitution as these two sub-sections stood before the Amendment Act.

> "49 (1) Every member of the House of Representatives shall vacate his seat in the House at the next dissolution of Parliament after his election.
>
> (2) A member of the House of Representatives shall also vacate his seat in the House where-
>
> (a) he resigns it by writing under his hand addressed to the Speaker or, where the office of Speaker is vacant or the Speaker is absent from Trinidad and Tobago, to the Deputy Speaker;
>
> (b) he is absent from the sittings of the House for such period and in such circumstances as may be prescribed in the rules of procedure of the House;
>
> (c) he ceases to be a citizen of Trinidad and Tobago;
>
> (d) subject to the provisions of sub-section (3), any circumstances arise that, if he were not a member of the House of Representatives, would cause him to be disqualified for election thereto by virtue of sub-section (1) of section 48 or any law enacted in pursuance of sub-section (2) of that section."

All three members of the Court of Appeal, (Hyatali C.J., Kelsick and Cross JJ.A.) found in the language of sub-section (1) an implication which led them to construe it as if it read:-

> "(1) Each member of the House of Representatives shall <u>retain</u> his seat in the House until the next dissolution of Parliament after his election and shall <u>then</u> vacate it." (Emphasis added).

It was only by adopting this construction of sub-section (1) for which their Lordships, with respect,

cannot find any justification either in the words of section 49 itself or in the framework of that part of the Constitution, Chapter 4, that deals with Parliament, that the Court of Appeal were able to treat sub-section (2) as being, in the words of Kelsick J.A. "in substance a proviso to section 49(1)".

Their Lordships would start by drawing attention to the irrational consequences that would follow from treating sub-section (2) as entrenched by infection from sub-section (1) despite its conspicuous omission from the list of entrenched provisions in section 54(2) and (3). In a total of over sixty entrenched provisions listed in section 54(2) and (3), section 49(1) is one of five only in which a part of a section and not the section as a whole has been singled out for entrenchment. How far then does entrenchment by infection from section 49(1) spread beyond section 49(2) itself? Paragraph (d) of section 49(2) includes, as a ground for requiring a member to vacate his seat, circumstances arising that would cause him to be disqualified for election by virtue of sub-section (1) of section 48 or any law enacted in pursuance of sub-section (2) of section 48. No part of section 48 is itself included among the entrenched sections. Furthermore paragraph (g) of section 48(1) opens the door to further grounds of disqualification in the future not already specified in paragraphs (a) to (f), since it disqualifies from election to the House of Representatives any person who "is not qualified to be registered as an elector at a Parliamentary election under any law in force in Trinidad and Tobago". That takes one to section 51 which deals with qualification of voters. Section 51 is entrenched by section 54(3), but it is drafted in the following terms:-

> "51. Subject to such disqualifications as Parliament may prescribe, a person shall be qualified to vote at an election of members to serve in the House of Representatives if, and shall not be qualified to vote at such an election unless, he -
>
> (a) is a Commonwealth citizen (within the meaning of section 18) of the age of eighteen years or upwards; and
>
> (b) has such other qualifications regarding residence or registration as may be prescribed."

"Prescribe" by the definition section, section 3, means "prescribed by or under an Act of Parliament". So the introductory words of the section reserve to Parliament power to pass ordinary laws involving no amendment to the Constitution but which create disqualifications to be a member of the House that are

additional to those expressly referred to in either section 48 or 51.

In their Lordships' view this is enough to demonstrate that an argument in favour of implication of entrenchment of section 49(2) by infection from the express entrenchment of section 49(1) is unsustainable. On the contrary, the draftsman's selection for entrenchment of specific provisions of chapter 4 of the Constitution dealing with Parliament, leaving the other provisions of that chapter susceptible of amendment by an ordinary Act of Parliament, provided that it contains a statement that such is its purpose, appears to their Lordships to follow a coherent and logical pattern.

Broadly speaking it is those provisions of the Constitution that deal with the institutional characteristics of Parliament, as the organ of the State in which by section 53 is vested the plenitude of the legislative power of the sovereign Republic of Trinidad and Tobago, that are protected by entrenchment; those provisions that deal with the qualifications of individuals for membership of either House and with the internal procedure of either House are not.

Thus, entrenched provisions require that the Parliament of Trinidad and Tobago in which is vested the power to make laws (section 53) including laws altering the Constitution (section 54) is to be bicameral consisting of the President and the Senate and the House of Representatives (sections 39 and 61) presided over by officers called the President of the Senate and the Speaker respectively (section 58). The Senate is to consist of thirty-one members appointed by a method which ensures to the government of the day a majority of one (section 40). The House of Representatives is to consist of thirty-six members (section 46), elected for separate constituencies (section 70) by popular vote (section 51) the number of members and the boundaries of constituencies being subject to review upon the recommendation of an independent Elections and Boundaries Commission (sections 71 and 72). There is to be freedom of speech in Parliament (section 55(1)) but in other respects Parliament may determine the powers and privileges of each House by an ordinary unentrenched law (section 55(3)). Subject to restrictions as to money bills and the powers of the Senate in relation to them, Bills may be introduced in either House (sections 63 and 64), although section 59, which read in conjunction with section 54 provides that bills shall be passed by the votes of a majority of members present and voting thereon, is not entrenched. (This would appear to be somewhat

anomalous in relation to the general pattern of entrenchment of Parliament's institutional characteristics).

As regards the duration of Parliament and the requirements as to when it shall sit, Parliament must hold a session of each House at least once in every year with an interval not exceeding six months between each session (section 67). Intervals between sessions are the result of prorogation or dissolution. Prorogation leaves the membership of both Houses unchanged; but dissolution terminates the membership of every member of the Senate (section 43(1)) and of every member of the House of Representatives (section 49(1)). If any of them wish to be members of the next Parliament they must be either re-appointed to the Senate or re-elected to the House of Representatives (section 69). Subject to possible extension in time of war or in the presence of an emergency, a Parliament must not last longer than five years from the date of its first sitting although it may be dissolved earlier (section 68); and a general election of members to the House of Representatives must be held within three months of the dissolution and fresh appointments to the Senate must be made by the President as soon as practicable thereafter (section 69).

In contrast to these entrenched provisions, those provisions which deal with the qualification of individuals to be appointed to and to remain members of the Senate are unentrenched. These are sections 41, 42 and 43 sub-sections (2) to (6) and section 44 which deals with temporary appointments during temporary inability of senators to perform their functions. Similarly, as regards the qualifications of individuals to be elected to and to remain members of the House of Representatives, these also are unentrenched. They are sections 47, 48, 49(2) to (6) on which their Lordships have already commented. Consistently with this pattern, section 52 which confers upon the High Court and upon the Court of Appeal jurisdiction to determine questions of disputed membership of either House is unentrenched.

In their Lordships' view, which is in agreement with that expressed by Bernard J., the words of section 54(2) and (3) are clear and categorical. Of section 49 only sub-section (1) is entrenched; sub-sections (2) to (6) are not and there is no room for any implication that they are. Consequently Parliament was empowered by sections 53, 54(1) and 59 of the Constitution to proceed, by an Act of Parliament not supported by the majorities of votes specified in either sub-section (2) or (3) of section 54, to add the new paragraph (e) to sub-section 49(2)

of the Constitution creating a further ground on which an individual member of the House of Representatives could be required to vacate his seat; or in other words to create an additional disqualification of individuals for membership of the House.

So on the question of substantive law the appellants succeed in their appeal. Even if Mr. McLeod had been right in his original submission that the Amendment Act had the effect of abrogating, abridging or infringing some fundamental right to which he was entitled under sections 4 and 5 of the Constitution, this could not avail him on the question of substantive law, because sections 4 to 14 of the Constitution are entrenched, not by sub-section (3) but by sub-section (2) of section 54; and as was pointed out in the judgment of Bernard J., the majority by which the Amendment Act was passed in each House satisfied the requirements of the latter sub-section.

Strictly speaking, it is not essential for their Lordships to decide on this appeal the question of procedural law as to whether Mr. McLeod's proper remedy, if he had been right on the question of substantive law, would have been by originating summons for a declaration that the Amendment Act was void under section 2 of the Constitution and not by originating motion for redress under section 14(1) of the Constitution. Furthermore, as all three members of the Court of Appeal in the instant case remarked, the Rules of the Supreme Court contain provisions which would enable one procedure to be substituted for the other at any stage before judgment, if it should turn out that the wrong procedure had initially been adopted. Nevertheless, Hyatali C.J. and Kelsick J., in their judgments, did express a view as to the meaning of the expression "protection of the law" in section 4(b) of the Constitution with which their Lordships feel compelled to express their respectful disagreement.

The Judicial Committee has previously had occasion to draw attention to the necessity of vigilance on the part of the Supreme Court to prevent misuse by litigants of the important safeguard of the rights and freedoms enshrined in sections 4 and 5, that is provided by the right to apply to the High Court for redress under section 14. Two specific forms that such misuse may take have previously been dealt with in judgments of the Judicial Committee. In *Harrikissoon v. Attorney General of Trinidad and Tobago* [1980] A.C.265 at p. 268, it was said of the identical section, although differently numbered, section 6 in the 1962 Constitution:-

> "The notion that whenever there is a failure by an organ of government or a public authority or

> public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress, when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the sub-section if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

In *Chokolingo v. Attorney General* [1981] 1 W.L.R.106 the Judicial Committee applying what they had previously said obiter in *Maharaj v. Attorney General of Trinidad and Tobago* (No. 2) [1979] A.C. 385, held that the procedure for redress under section 6(1) of the 1962 Constitution was not to be used as a means of collateral attack upon a judgment of a court of justice of Trinidad and Tobago acting within its juridiction, whether original or appellate.

The instant proceedings do not fall into either of the above categories. Since a question of the interpretation of the Constitution was involved Mr. McLeod would have had an appeal to the Judicial Committee as of right under section 109(1)(c) of the Constitution whichever form of procedure he had adopted; nor, since the High Court was the court of competent jurisdiction whichever procedure he adopted, is there any question of collateral attack on a judgment of a court of competent jurisdiction.

In his originating motion however the only infringement of his fundamental rights that Mr. McLeod alleged was his right to "the protection of the law" under section 4(b) of the Constitution. The "law" of which he claimed to have been deprived of the protection was section 54(3) of the Constitution, which he contended (successfully in the Court of

Appeal) prohibited Parliament from passing the Amendment Act, except by the majorities specified in that sub-section. This argument, although it was accepted by Hyatali C.J. and Kelsick J.A., in the Court of Appeal is in their Lordships' view fallacious. For Parliament to purport to make a law that is void under section 2 of the Constitution, because of its inconsistency with the Constitution, deprives no-one of the "protection of the law", so long as the judicial system of Trinidad and Tobago affords a procedure by which any person interested in establishing the invalidity of that purported law can obtain from the courts of justice, in which the plenitude of the judicial power of the State is vested, a declaration of its invalidity that will be binding upon the Parliament itself and upon all persons attempting to act under or enforce the purported law. Access to a court of justice for that purpose is itself "the protection of the law" to which all individuals are entitled under section 4(b).

Their Lordships have been invited by the appellants to supply a comprehensive definition of what is meant by the expression "the protection of the law" in section 4(b). This is an invitation which their Lordships consider that they must decline in a case in which, owing to the respondent not being represented, they have not had the benefit of adversarial argument. In *Thornhill v. Attorney General of Trinidad and Tobago* [1981] A.C.61 a case in which a person sought redress, under the section that under the 1962 Constitution corresponded to section 14, for having been deprived of access to his legal adviser while under arrest by the police, the Judicial Committee said in relation to sections 1 and 2 of the 1962 Constitution, which are re-numbered sections 4 and 5 in the Constitution of 1976:-

> "Section 2 is directed primarily to curtailing the exercise of the legislative powers of the newly constituted Parliament of Trinidad and Tobago. Save in the exceptional circumstances referred to in section 4 '[sc. of the 1962 Constitution]' or by the exceptional procedure provided for in section 5 '[sc. of the 1962 Constitution]' the Parliament may not pass any law that purports to abrogate, abridge or infringe any of the rights or freedoms recognised and declared in section 1 or to authorise any such abrogation, abridgement or infringement. But section 2 also goes on to give, as particular examples of treatment of an individual by the executive or the judiciary, which would have the effect of infringing those rights, the various kinds of conduct described in paragraphs *(a)* to *(h)* of that section. These

> paragraphs spell out in greater detail (though not necessarily exhaustively) what is included in the expression 'due process of law' to which the appellant was entitled under paragraph *(a)* of section 1 as a condition of his continued detention and 'the protection of the law' to which he was entitled under paragraph (b)."

In that passage their Lordships took the precaution of incorporating the words in parenthesis "(though not necessarily exhaustively)". An appeal which is undefended does not provide an appropriate occasion to jettison that precaution and to embark upon an attempt to provide a more exhaustive definition of what is meant by "the protection of the law". The problem of defining what is included in each of the fundamental human rights and freedoms referred to in the lettered paragraphs of sections 4 and 5(1) is best dealt with on a case-to-case basis.

The appeal must be allowed and the order of Mr. Justice Bernard of 19th December 1978 restored. There will be no order as to costs.